RHB BANK BHD A

v.

HIAP LEONG TRADING SDN BHD

COURT OF APPEAL, PUTRAJAYA B
TENGKU BAHARUDIN SHAH JCA
SURIYADI HALIM OMAR JCA
HELILIAH MOHD YUSOF JCA
[CIVIL APPEAL NO: W-02-393-2002]
11 FEBRUARY 2011 C

CONTRACT: *Tenancy agreement - Construction of agreement - Termination of agreement - Arrears of rental - Whether tenancy agreement a monthly or three-year agreement - Amount of rent payable - Fundamental conditions not satisfied - Monthly tenancy - Whether notice of one month sufficient to terminate agreement* D

LANDLORD AND TENANT: *Agreement - Construction - Termination of agreement - Arrears of rental - Whether tenancy agreement a monthly or three-year agreement - Amount of rent payable - Fundamental conditions not satisfied - Monthly tenancy - Whether notice of one month sufficient to terminate agreement* E

The appellant, the tenant, had entered into a tenancy agreement with the respondent, the owner of the premises, spanning three years (commencing 15 January 1995) with a monthly rental of RM8,000. On 13 August 1997, the appellant informed the respondent of its intention to renew the existing tenancy for a further three years subject to the same terms and conditions. The appellant also proposed that an additional term be included that would allow it to terminate the second tenancy agreement by giving the respondent six months' notice in writing. The respondent disagreed with the appellant on the inclusion of the additional term and at the same time wished to increase the rental by 5%. Despite this, the appellant continued to occupy the premises for an additional six months *ie*, from 15 January 1998 to 30 June 1998, and paid the same monthly rental of RM8,000, which the respondent accepted without any protest. The appellant, on 30 May 1998, issued one month's notice to the respondent stating its intention to terminate the new tenancy agreement, and with effect from 1 July 1998, vacated the F G H I

premises. The respondent then filed a claim for arrears of rental against the appellant in the High Court, which the trial judge allowed. Hence, the present appeal by the appellant.

Held (allowing the appeal with costs)

Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) The trial judge, on the facts, had failed to discuss the real issue, which was whether the new tenancy agreement was a monthly or three-year agreement. Furthermore, he had misdirected himself when he decided that it was implied by the parties' conduct that they had reached a mutual agreement on the amount of rent payable. Pertaining to the new tenancy agreement, the parties had yet to agree, *inter alia*: (i) on other aspects of the terms and conditions to their mutual satisfaction; (ii) whether to increase the rental by 5%; and (iii) whether to include the new provision as requested by the appellant. With fundamental conditions left unsatisfied, a three-year tenancy agreement could not be said to have been reached. A binding contract had not been sealed in this case as the appellant's offer had not been accepted by the respondent. There was only a monthly tenancy; hence, one month's notice was sufficient in the circumstances of this case. On the above grounds, the respondent had failed to establish its case on a balance of probabilities. (paras 12-16)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu, iaitu penyewa, telah menandatangani suatu perjanjian penyewaan dengan responden, pemilik premis tersebut, selama tiga tahun (bermula dari 15 Januari 1995) dengan sewa bulanan sebanyak RM8,000. Pada 13 Ogos 1997, perayu memberitahu responden mengenai niatnya untuk membaharui penyewaan yang ada selama tiga tahun lagi tertakluk kepada terma dan syarat yang sama. Perayu juga mencadangkan bahawa suatu terma tambahan dimasukkan yang akan membolehkannya menamatkan perjanjian penyewaan kedua dengan memberi responden notis bertulis enam bulan. Responden tidak menyetujui dengan perayu tentang pemasukan terma tambahan tersebut dan pada masa yang sama ingin menaikkan sewa sebanyak 5%. Meskipun begitu, perayu

masih mendiami premis bagi tempoh tambahan selama enam bulan, iaitu, dari 15 Januari 1998 hingga 30 Jun 1998, dan membayar sewa bulanan yang sama sebanyak RM8,000, yang diterima oleh responden tanpa apa-apa bantahan. Perayu, pada 30 Mei 1998, mengeluarkan notis satu bulan kepada responden menyatakan niatnya untuk menamatkan perjanjian penyewaan yang baru, dan dari 1 Julai 1998, meninggalkan premis tersebut. Responden kemudiannya memfailkan suatu tuntutan bagi tunggakan sewa terhadap perayu dalam Mahkamah Tinggi, yang dibenarkan oleh hakim bicara. Oleh yang demikian, rayuan semasa oleh perayu.

Diputuskan (menolak rayuan dengan kos)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara, berdasarkan fakta, telah gagal menimbangkan isu sebenar, iaitu sama ada perjanjian penyewaan baru adalah suatu perjanjian bulanan atau tiga tahun. Lagipun, beliau telah menyalaharahkan dirinya bila beliau memutuskan bahawa ia tersirat dari kelakuan pihak bahawa mereka telah mencapai perjanjian bersama atas amaun sewa yang perlu dibayar. Berhubungan dengan perjanjian penyewaan baru, pihak belum lagi bersetuju, antara lain: (i) atas aspek lain terma dan syarat sehingga mereka bersama-sama berpuas hati; (ii) sama ada untuk menaikkan sewa sebanyak 5%; dan (iii) sama ada untuk memasuki peruntukan baru seperti yang diminta oleh perayu. Dengan syarat asasi tidak dipuaskan, suatu perjanjian penyewaan tiga tahun tidak boleh dikatakan telah dicapai. Kontrak yang mengikat tidak dapat dimeterai dalam kes ini kerana tawaran perayu tidak diterima oleh responden. Hanya terdapat suatu penyewaan bulanan; oleh itu, notis satu bulan adalah mencukupi dalam keadaan kes ini. Atas alasan-alasan di atas, responden telah gagal membuktikan kesnya atas imbangan kebarangkalian.

[Diperintah sedemikian.]

Case(s) referred to:
Lim Geak Liang v. East West UMI Insurance Bhd [1997] 4 CLJ 405 FC ***(refd)***
Teo Siew Peng v. Guok Sing Ong & Anor [1982] 1 LNS 99 CA ***(refd)***
United Dominions Trust (Commercial) Ltd v. Eagle Aircraft Services Ltd [1968] 1 All ER 104 ***(refd)***

For the appellant - Satish Vasudevannair (Ida Fazlina with him); M/s Gulam & Wong
For the respondent - K Thavanesan Kanapathipillai (Raja Nazrin Raja Ghazilla with him); M/s Ariffin & Thava

[Appeal from High Court, Kuala Lumpur; Suit No: S1-22-318-99]

Reported by Suresh Nathan

JUDGMENT

Suriyadi Halim Omar JCA:

[1] The plaintiff (hereinafter referred to as the respondent) had filed a claim against the defendant (hereinafter referred to as the appellant) for arrears of rental. In order to resolve the suit the High Court had to determine whether a binding tenancy contract existed between them in the first place. The answer at the end of the hearing was in the positive and the learned judge accordingly allowed the claim. Being dissatisfied the appellant filed a notice of appeal and we heard the appeal. We unanimously allowed the appeal with costs.

[2] To appreciate the appeal we herewith reproduce the agreed facts and they are as follows:

[3] The appellant was the tenant of the ground floor to the third floor of a four storey shop-house known as no. 142, Jalan 2/3A, (Pasar Borong Development) 68100 Batu Caves, Kuala Lumpur (the premises). The respondent was the registered owner of the premises. Both the appellant and the respondent had entered into a tenancy agreement on 24 April 1995, spanning three years starting from 15 January 1995, with a monthly rental of RM8,000. It would determine on 14 January 1998. The appellant used the premises as a bank and any business relating to banking on the terms and conditions contained in the said tenancy agreement.

[4] As permitted by the tenancy agreement, by a letter dated 13 August 1997, the appellant's solicitor informed the respondent of its intention to take up the option of renewing the existing tenancy for a further three years period, also at RM8,000 per month subject to the same terms and conditions. In this letter it

was also proposed to the respondent that an additional term be included, a provision that allowed it to terminate the second tenancy agreement by giving the respondent six months notice in writing. However, the respondent did not reply to the above letter or to a reminder sent on 12 September 1997.

[5] It was not disputed that the respondent through its solicitor, wrote to the appellant on 23 October 1997, disagreeing to the inclusion of the additional term proposed by the appellant, and at the same time wishing to increase the rental by 5%. Despite the want of meeting of the minds the appellant continued to occupy the said premises from 15 January 1998 onwards until 30 June 1998 ie, for an additional period of six months. During this six months period the respondent accepted the rental of RM8,000 per month without any protest. By a letter dated 30 May 1998, a one month notice was issued by the appellant, stating its intention to terminate the new tenancy agreement, and with effect from 1 July 1998 vacated the premises.

[6] Due to the termination of the new tenancy the respondent commenced an action for the recovery of RM272,500, consisting of RM240,000 being loss of rental for thirty months (unexpired period) under the new tenancy agreement of three years, and RM32,500 being expenses incurred for restoration works to the said premises. In a gist, as far as the respondent was concerned, by the appellant continuing to stay in the premises, and paying the monthly rental of RM8,000, a new three years tenancy agreement had concretized. By the termination the appellant had breached the new agreement thus causing losses to the respondent. The appellant counterclaimed for RM24,000 for the deposit paid to the respondent. At the trial, the respondent withdrew its claim for restoration works and judgment was entered for RM168,000 (being rental for twenty-four months from 15 June 1998 to 14 January 2001 less the amount counterclaimed by the appellant of RM24,000).

[7] The non-agreed facts before us were as follows, namely:

i. the new tenancy agreement was exercised in accordance with cl. 4(d) of the tenancy agreement, which created a new tenancy for a fixed term of three years from 15 January 1998 to 14 January 2001;

A ii. the rental for the said premises after 14 January 1998 was agreed upon by both parties through an implied conduct of parties notwithstanding the requirement of cl. 4(d);

iii. despite the non-compliance of cl. 4(d), and the uncertainty
B pertaining to the amount of rental payable, the occupation was not on a monthly basis; and

iv. the appellant breached the new tenancy by issuing one month notice to determine it, and that the respondent thus was
C entitled to recover the rentals from 15 June 1998 to 14 January 2001.

[8] With cl. 4(d) as provided for in the tenancy agreement being central to this appeal, we herewith reproduce it. It reads:

D > ... Upon the expiration of the term of the Tenancy hereby granted and referred to in clause 1 hereof, if the Tenant shall at its option be desirous of renewing the Tenancy for a further term of three (3) years and shall not less than six (6) months prior to the expiration of the term of the Tenancy give to the landlord a notice in writing of its desire to renew the Tenancy, the Landlord
E > shall grant to the Tenant a tenancy in respect of the said Demised Premises for such further term of three (3) years commencing immediately upon the expiration of the Tenancy (hereinafter referred to as "the Second Tenancy") **subject to all other aspects to the same terms and conditions as are herein**
F > **contained at a monthly rental to be determined** as follows:
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> (i) Being a rent to be mutually agreed upon by the parties hereto based on the fair market rent for similar premises in the vicinity then prevailing or
>
G > (ii) Being a rent in an amount not exceeding fifteen per centum (15%) increase from the rent of Second the Tenancy;
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> whichever shall be lower ALWAYS PROVIDED that in the event that the parties hereto shall be unable to reach mutual agreement on the rent payable under Clause 4.0 (d)(i) above then subject to
H > Clause 4.0 (d)(ii) above the fair market rent shall be determined by Messrs. C.H. Williams Talhar & conclusive and shall be binding on the parties hereto ...

[9] The appellant submitted before us that the exercise of the
I option was a question of law and we could hear this appeal even though this question was not raised at the High Court. Conversely, the respondent's counsel ventilated that the issue

before us hinged on facts thus barring us from hearing this appeal. We alluded to the case of *Lim Geak Liang v. East West UMI Insurance Bhd* [1997] 4 CLJ 405, and decided that we could proceed with the matter. The Federal Court there had opined that:

> … When a question of law was raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it was not only competent but expedient, in the interest of justice, to entertain the plea (*Gulwant Singh v. Abdul Khalik* [1965] 2 MLJ 55 followed).

[10] The appellant submitted that the option clause provided, *inter alia*, that if it was desirous of renewing the tenancy agreement for another three years, it must give the respondent a written notice, not less than six months prior to the expiration of the tenancy. Further, the respondent shall grant a tenancy for a further period of three years (the second tenancy agreement) subject to all the terms and conditions having been agreed upon. The appellant ventilated that even though 13 July 1997 was the last date yet one month after that date matters were still unclear. Evidence was alluded to by the appellant to establish the uncertain situation especially the respondent's intention to increase the rental by 5% and rejecting inclusion of the new clause in the new tenancy agreement.

[11] Despite the above uncertainties the appellant continued paying rental of RM8,000 every month; and accepted by the respondent without protest. Before vacating the premises the appellant also gave one month notice to the respondent of its intention to terminate the tenancy.

[12] Having perused the notes of proceedings and the grounds of judgment we found that the learned judge failed to discuss the real issue. We found that the learned judge failed to determine whether the new tenancy agreement was a monthly agreement or a three years agreement. Further we found that the learned judge had misdirected himself when he decided that it was implied by the conduct of the parties that they had reached a mutual agreement on the amount of rent payable.

[13] From the facts, and pertaining to the new tenancy agreement, we found that the parties had yet to agree:

A i. on the other aspects of the terms and conditions to the mutual satisfaction of both parties;

ii. whether to increase the rental by 5%;

B iii. whether to include the new provision as requested by the appellant;

iv. on the agreed monthly rental; and

v. despite parties failing to reach mutual agreement on the rent C payable, Messrs. C.H. Williams Talhar was not consulted to determine the binding fair market rent.

[14] With the fundamental conditions left unsatisfied it could not be said that a three years tenancy agreement had been reached. D Unless the acceptance corresponds with the offer of the appellant, let alone never at anytime mutually agreed upon, it could not be said a binding contract had been sealed in this case (*United Dominions Trust (Commercial) Ltd v. Eagle Aircraft Services Ltd* [1968] 1 All ER 104). The Singapore Court of Appeal in *Teo Siew* E *Peng v. Guok Sing Ong & Anor* [1982] 1 LNS 99 had succinctly said:

> It is settled law that an option is a unilateral contract which does not become binding on the grantor of the option until the exact terms of the option are complied with.

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[15] Before us therefore was only a monthly tenancy, with this monthly tenancy defence sufficiently laid down in the statement of defence. That being so a one month notice was sufficient in the circumstances of the case.

G **[16]** Based on the above grounds, we were satisfied that the respondent had failed to establish its case on a balance of probability hence allowing the appeal with costs. We meted down the consequential orders in the following manner:

H a. the appeal be allowed with costs;

b. the respondent to refund RM173,336, a sum paid earlier by the appellant pursuant to an order dated 28 July 2000;

c. the deposit be refunded to the appellant; and

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d. interest be charged on the RM173,336.